(1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARY LYNOM, Lt. Colonel,

Petitioner,

v.

Dr. SHEILA E. WIDNALL; DONALD W. SHEPPERD; CRONIN H. BYRD; C. BRUCE BRASWELL; DOUGLAS J. HEADY; JOHN H. LYNSKEY; ALBERT BUNTING; JOE G. LINEBERGER, SAF/MIB, individually and officially; DAVID SCOBEY, Colonel, ANG PME/CC; WILLIAM F. BLAND, Major General; PHILLIP KILLEY, Major General; and JOHN CONAWAY, Lt. General;

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Did the Court of Appeals for the District of Columbia Circuit err in summarily holding that the *Feres* Doctrine and its progeny preclude a military member from bringing a constitutional tort claim of conspiracy against her superiors *who repeatedly acted outside the line of duty* in their efforts to injure her?

PARTIES TO THE PROCEEDINGS

The parties to this Petition are:

Petitioner Lieutenant Colonel Mary Lynom.

Respondent Dr. Sheila E. Widnall.

Respondent Donald W. Shepperd.

Respondent Cronin H. Byrd.

Respondent C. Bruce Braswell.

Respondent Douglas J. Heady.

Respondent John H. Lynskey.

Respondent Albert Bunting.

Respondent Joe G. Lineberger.

Respondent David Scobey.

Respondent William F. Bland.

Respondent Phillip Killey.

Respondent John Conaway.

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PETITION FOR WRIT OF CERTIORARI

Lieutenant Colonel Mary Lynom petitions for a Writ of Certiorari to reverse the judgment below of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit's opinion is unpublished. The District of Columbia Circuit's order denying the Petition for Rehearing is unpublished.

There are no related opinions in this case.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit filed its opinion on October 25, 2000. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* on January 4, 2001.

The United States District Court for the District of Columbia had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1334 for claims of Plaintiff Mary Lynom arising under the U.S. Constitution and laws of the United States.

Appellate jurisdiction existed under 28 U.S.C. § 1291 when the District Court, Sullivan, J., entered a final judgment as to the First, Second, and Fourth causes of action

in the Amended Complaint on September 24, 1999. Notice of Appeal was timely filed on November 23, 1999.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

28 U.S.C. § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast

Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

In 1975, Mary Lynom, an African-American female, joined the Air National Guard (ANG) as a commissioned officer. In 1981, the Guard offered her a slot in its active duty program, which she entered as Captain. By 1985 she received a promotion to Major.[1]

[1] At this time Petitioner holds the rank of Lieutenant Colonel (Lt. Col.), a grade also known as O-5. During almost all of the sexual harassment and retaliation she held the rank of Captain (an O-3 in the Air Force) and then Major (grade O-4). Counsel will predominantly use Lt. Col. Lynom's present rank when referring to her in this petition to avoid confusion.

From 1981 to 1984, Lt. Col. Lynom endured rampant sexual misconduct by fellow and superior officers, including now-retired Brig. Gen. Albert Bunting. These violations occurred under the command of now-retired Lt. Gen. John Conaway at the ANG Readiness Center.

Gen. Bunting maintained a notorious coterie of females – routinely referred to as "Bunting's Bunnies" – actually composed of enlisted women and lower-ranking female officers who participated in parties he organized. Gen. Conaway attended many of these parties – which occurred off-base, after duty hours.

Lt. Col. Lynom refused Gen. Bunting's solicitations to become a Bunting Bunny. He responded to this refusal by castigating her for not being a "team player" – and that this refusal to become a Bunny was somehow "threatening to the men around her." Thus began a conspiracy to deprive Lt. Col. Lynom of her civil and Constitutional rights.

Winning appointment to the Air Command and Staff College (ACSC) at the Air University located at Maxwell AFB, Alabama, Lt. Col. Lynom graduated in 1987 with a favorable evaluation. Returning to the Guard's Readiness Center, she expected appointment as Chief of the ANG History Office. Instead, her superiors declared her "overage," downgraded her to Historian, and assigned her a non-funded position. Gen. Bunting, however, claimed she would receive an active-duty assignment in Personnel (her original specialty).

Gen. Bunting subsequently solicited sexual favors from Lt. Col. Lynom by telephone for the next three weeks. Lt. Col. Lynom refused Gen. Bunting's advances.

She then learned of her future dismissal from her active duty assignment in the Statutory Tour Program.

Lt. Col. Lynom met with Gen. Conaway about Gen. Bunting's sexual advances and the retaliatory exclusion from the Statutory Tour program. Gen. Conaway responded by telling Lt. Col. Lynom she could not prove this sexual harassment, and refused to help – thus granting his imprimatur to this disgraceful, off-duty behavior, locking in and perpetuating the ongoing retaliation and reprisals against Lt. Col. Lynom for her refusal to trade sex for professional advancement.

Lt. Col. Lynom contacted Senator Barbara Mikulski of Maryland, requesting a Congressional Inquiry concerning her situation. Gen. Conaway now claimed that he would help Lt. Col. Lynom – if she retracted this inquiry. Lt. Col. Lynom did so. Gen. Conaway then granted her only two short tour extensions. Meanwhile, Gen. Conaway twice refused requests from Lt. Col. Lynom's supervisor, Lt. Col. Michael Carroll, to place her in a promotable vacancy and continue her on active duty.

In May 1989, Gen. Conaway finally admitted someone "had it in" for Lt. Col. Lynom. To protect himself, he initiated an Inspector General (IG) inquiry of her complaints, appointing a Lt. Col. Curtis Griffith from the Office of the Inspector General (OIG) to investigate. Lt. Col. Griffith's investigation substantiated Lt. Col. Lynom's claims of sexual harassment, discrimination, and retaliation.

Gen. Conaway signed a letter approving this original investigative report, but the letter mysteriously "disappeared" from Lt. Col. Griffith's desk in the IG's office before the report was released.

Subsequently, Col. H. Cronin Byrd, Inspector General for the Air National Guard, ordered Lt. Col. Griffith to alter his report. Col. Byrd ended up demanding so many changes that Lt. Col. Griffith refused to sign what had been his very own report. When Lt. Col. Griffith showed Col. Byrd a piece of evidence supporting his original findings, Col. Byrd ripped that letter up and threw it away stating, "What letter?" Col. Byrd (now retired) then signed off on the expurgated IG report.

After sustained effort, Lt. Col. Lynom and her counsel finally obtained this report, but the copy provided was almost completely blackened out and thoroughly censored.

Meanwhile, Lt. Col. Lynom's superiors repeatedly denied her funded positions with promotion potential, passing her over for now lower ranking and less experienced males.

Lt. Col. Lynom's immediate supervisor at this time, Lt. Col. Michael Carroll, recommended upgrading her rank at that time (Major, O-4) to an O-5 slot, entitling her to promotion to Lieutenant Colonel in 1989. The superior officers participating in the conspiracy to retaliate against Lt. Col. Lynom were also in position to see Lt. Col. Carroll's recommendations rejected, and did so.

On November 8, 1990, Lt. Col. Lynom filed a reprisal complaint through Senator Mikulski with the Department

of Defense (DOD). The DOD tasked the U.S. Air Force's Office of the Inspector General to investigate this inquiry and complaint.

Despite this, in June 1991, the ANG separated Lt. Col. Lynom "for cause" within two months of the end of her active duty tour. The Air Force IG's Report of Investigation (ROI) would later conclude that this separation "denied [her] the due process required by . . . regulation."

On May 8, 1992, Lt. Col. Lynom petitioned the Air Force Board for Correction of Military Records ("the AFBCMR" or "the Correction Board") for relief. Air Force Regulation 31-3 (dated 31 May 1985) was in effect when then-Major Lynom submitted her application. This regulation authorized the Correction Board to:

> . . . obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues. The applicant will have access to ***evidence developed by the investigation*** in accordance with paragraph 14 and may submit additional comment with regard to the evidence.

(Emphasis added).

On August 14, 1992, the Secretary of the Air Force's Office of the Inspector General (SAFIG) completed its Report of Investigation (ROI) concerning Lt. Col. Lynom's complaint. This ROI also supported Lt. Col. Lynom's claims. SAFIG even invited the AFBCMR to review pertinent documents supporting Lt. Col. Lynom's claims. The Correction Board, however, inexplicably declined to do so.

On January 28, 1993, Lt. Col. Lynom responded through Counsel to the National Guard Bureau's (NGB's) Advisory Opinion to the Correction Board, noting that it did not dispute the claims of discrimination, nor did it challenge any facts in her application or her supporting documents. Lt. Col. Lynom had only been able to supply the Correction Board with the heavily redacted copies of the Byrd Report of Investigation (the revised report Lt. Col. Griffith had originally authored but then refused to sign) that she had received from the NGB/IG.

On February 9, 1993, SAFIG sent a copy of its summary report to the AFBCMR. But the Correction Board did not provide Lt. Col. Lynom or her counsel this report for comment.

The AFBCMR considered Lt. Col. Lynom's petition a week later on February 16, 1993. In a highly unusual move, Col. C. Bruce Braswell (Ret.), the Correction Board's Executive Secretary, appointed himself to Lt. Col. Lynom's panel. The Correction Board then rejected the IG Report's suggestions for relief, and arbitrarily awarded Lt. Col. Lynom only reinstatement as Major and back pay for the separation time from ANG. The Correction Board then quietly sat on its decision, not issuing it until October 14, 1993 – giving no reason for their highly unusual and excessive eight-month delay.

Lt. Col. Lynom returned as a Major to active duty February 4, 1994. However, the retaliation continued, shuffling her from one non-promotable position to another.

Finally, Lt. Col. Lynom came to federal court in early 1995, filing her verified Complaint on February 3, containing an Administrative Procedure Act (APA) claim and three claims alleging Constitutional torts by the named individual Defendants (now Respondents). She sought injunctive relief and damages.

The United States Attorney, appearing for the named individuals and the United States, moved to dismiss the tort claims and answered the claim predicated on the APA. The district court denied that motion to dismiss.

After the filing of the Administrative Record applicable to the APA claim, the Respondents renewed their motion to dismiss and for summary judgment. Lt. Col. Lynom filed a cross-motion for partial summary judgment on the APA claim. The District Court issued its decision on September 17, 1998, granting Petitioner's motion and remanding the matter back to the AFBCMR. The court, however, dismissed the Constitutional tort claims, citing *Feres v. United States*.

Upon remand, a second impaneled Correction Board finally accepted Lt. Col. Griffith's (and others') investigative reports, stating in its concluding remarks that these reports are replete with instances of "questionable treatment of the applicant [Lynom] by high level officials within the NGB." Significantly, this second Correction Board also chose to cite in its conclusion Lt. Col. Griffith's profound disappointment, after all his years of faith in the fairness of the system, "that it was capable of such corruption."

This Correction Board backdated Lt. Col. Lynom's promotion to Lieutenant Colonel ***nine years*** to April 16,

1989. However, it declined full relief which by that time – given her outstanding performance and ten years time in grade – among other things, should have also included promotion on to the O-6 grade of full Colonel.[2]

Lt. Col. Lynom appealed the Constitutional tort dismissals. On October 24, 2000, the U.S. Court of Appeals affirmed the district court's dismissals, again based on the *Feres* Doctrine. Appellant Lynom then filed a Petition for a Rehearing and a Rehearing *en banc*. The Court of Appeals denied this Petition on January 4, 2001.

Petitioner Lt. Col. Lynom submits this Petition for a Writ of Certiorari seeking reversal of the District of Columbia Circuit's ruling, allowing her case to go forward against the named individuals who conspired against her with the intention of denying her civil and Constitutional rights.

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[2] Petitioner had finally been promoted to Lieutenant Colonel in October 1997. Lt. Col. Lynom has now been forced into retirement (effective January 2001) due to the length of time she held in her O-5 grade without further advancement (the second Correction Board having subsequently backdated this 1997 promotion to April 1989).

REASONS FOR GRANTING THE PETITION

I. WHETHER THE *FERES* DOCTRINE AND ITS PROGENY PRECLUDE LT. COL. LYNOM'S CONSTITUTIONAL TORT CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW.

The Appeals Court panel and the district court summarily applied the *Feres* Doctrine in analyzing this case. The appeals panel cited *Feres v. United States*, 340 U.S. 135 (1950); *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); and *Bois v. Marsh*, 801 F.2d 462 (D.C. Cir. 1986). None of these cases, however, bar Lt. Col. Lynom's Constitutional tort claims against the Respondents for their actions advancing a conspiracy against Lt. Col. Lynom in an effort to deny civil and Constitutional rights to her.

The concept of a service member suing the military or an officer did not first arise in the last fifty years. The United States Supreme Court dealt with this precise issue in 1849. That case, *Wilkes v. Dinsman*, 7 How. 89 (1849), *after remand*, *Dinsman v. Wilkes*, 12 How. 390 (1852), involved a Marine suing his commanding officer in civil court. The plaintiff claimed the officer wrongly punished him for refusing to perform military duties when the former's enlistment had expired. The Supreme Court permitted the suit, stating:

> It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, ***yet he is***

> ***not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.***
>
> ***The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office. Considerations connected with these views are involved in most of the points ruled by the court below.***

Id. at 76-77. (Emphasis added).

When *Feres* observed, "We know of no American law which ever has permitted a soldier to recover for negligence against either his superior officers nor the Government he is serving," it cited *Wilkes* in contrast because it involved an intentional tort. 340 U.S. at 141 and fn. 10. As in *Wilkes*, the Constitutional torts in this case are intentional.[3] Unlike *Wilkes*, where the military officer acted within the scope of his duty, Respondents' conduct here – sexual harassment and retaliation against Lt. Col. Lynom when she refused to be a prostitute – is wholly outside the scope of military authority and arose from deliberate

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[3] *Chappell* attempts to dismiss *Wilkes*, claiming that it did not ask the Court to imply a new cause of action and that since then the military justice system has undergone "significant" changes. 462 U.S. at 305, fn.2. The Court, however, does not specify what these "significant" changes are, nor does it more fully explain what this new cause of action is. Also, *Feres'* referencing *Wilkes* as an example of an intentional tort action, compared to the negligence actions the Court was addressing, establishes its precedential value. Moreover, *Chappell* does not say it is overruling *Wilkes*.

malice and oppression. Barring Lt. Col. Lynom from proceeding with her action inflicts an injustice upon her, and precludes her finding shelter under the "aegis of the law."

This Court should grant the Petition because *per se* application of the *Feres/Chappell* doctrine denies a service member fair and just consideration of his or her case. A *per se* approach ignores the facts and never holds the military – or its members – responsible for egregious violations of Constitutional rights. Additionally, blindly relying on *Feres/Chappell* ignores the requirement in *Feres* that the judiciary balance "the unique disciplinary structure of the Military," *Feres*, 483 U.S. at 678, with the courts' own duty to "make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander." *Winters v. United States*, 89 S.Ct. 57, 59-60 (1968) (Douglas, J., in chambers as Circuit Justice).

Upholding the Appeals Court's decision also means ignoring *Brooks v. United States*, 337 U.S. 49 (1949), decided the year before *Feres*. *Brooks* describes the correct judicial role in weighing claims against the military. *Brooks* held that a service member could bring a damage action against the military when an accident had no connection with the member's military duty. Plaintiffs, both military members, sued the military under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346. *Brooks* at 50. The Supreme Court permitted the suit, ruling that the accident in question had no connection with the plaintiff's army career.

Brooks discussed the FTCA and noted the express exceptions in the statute:

> The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that "any claim" means ***"any claim but that of servicemen."*** The statute does contain twelve exceptions. None exclude petitioners' claims. One is for claims arising in a foreign country. A second excludes activities of the military or naval forces or the Coast Guard, during time of war. . . . Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

Id. at 51-52. (Emphasis added).

Brooks then described the legislative background of the FTCA. Between 1925 and 1935, Congressional members introduced 18 tort claim bills:

> All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. . . . When H.R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared.

Id.

Brooks acknowledged the category of cases in which the injury was "incident to . . . military service" presented an entirely different case. *Id.* at 52. *Brooks* created the "incident/nonincident" dichotomy concerning cases brought in civilian courts against the military.[4]

Subsequent decisions have recognized this dichotomy and, instead of applying *Feres* automatically, examine the facts of each case to determine whether or not there is a military connection. Thus, *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), developed the "incident to service" test. The *Brown* test consists of three factors: "(1) the duty status of the service member, (2) the location of the injury, and (3) the nature of the activity." *Id.* at 367.

1. Duty Status – " . . . active duty status standing alone, is insufficient to invoke the *Feres* doctrine's bar." *Antoine v. United States*, 791 F.Supp. 304, 305 (D.D.C. 1992), *aff'd*, 990 F.2d 1377 (D.C. Cir. 1993); *see also Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1485 (9th Cir. 1991) (focusing on the parties' active duty status is "overbroad"); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 600 (5th Cir. 1994) (duty status falls along a spectrum and as plaintiff was off-duty his status was "not a strong indicator of whether he was acting incident to service"); *Elliott by and through Elliott v. United States*, 13 F.3d 1555, 1561 (11th Cir. 1994), *vacated for en banc hearing*, (28 F.3d 1076), *aff'd by operation of law*, 37 F.3d 617 (1994) (en banc

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[4] *Feres* did not overrule *Brooks*, but dealt only with cases in which injuries were incident to service. *Feres* distinguished *Brooks*, explaining the injury there did not arise out of or in the course of military duty. 340 U.S. at 146.

court evenly divided) (on-leave service member injured in his on-base housing not harmed incident to service).

Respondents' original abuse and resulting retaliation stemmed from non-active duty circumstances. The sexual parties and other sexual misconduct, which Lt. Col. Lynom rebuffed, mostly occurred during off-duty hours. She was also not on active duty from June 1991 through February 1994, when the Air Force Correction Board delayed what proved to be its arbitrary and capricious disposition of her petition to them. In short, Lt. Col. Lynom was either off-duty or her status was "along the middle of the spectrum and is not a strong indicator of whether [s]he was acting incident to service." *Kelly*, 26 F.3d at 600.

2. **Location of Injury** – Similarly, while the locale of the harm is suggestive, the site is not dispositive. "[T]here is no hard and fast rule" denying recovery in cases where the injury occurs on a military base. *Brown*, 739 F.2d at 367; *accord*, *Lutz*, 944 F.2d at 1486 n. 11. Moreover, "[a] rigid test would substitute for real analysis required to determine whether military personnel incurred injuries in an activity 'incident to service.' " *Elliott*, 13 F.3d at 1561. Rulings in the District of Columbia Circuit further illustrate this issue. *See, e.g., Johnson v. United States*, 735 F.Supp. 1 (D.D.C. 1990) (blood donation by active duty service member during Army sponsored blood drive at Army Hospital was not activity incident to service); *Johnson v. United States*, 810 F.Supp. 7 (D.D.C. 1993) (Defendant's Renewed Motion to Dismiss and Third Motion to Dismiss, in same case, denied despite additional evidence more closely tying blood drive to military context).

While Lt. Col. Lynom suffered injuries on military property, i.e., the Pentagon and Andrews Air Force Base, these were not the only places the harm occurred. The sexual parties and misconduct she rebuffed were mostly off-base as well as some on-base. Also, Lt. Col. Lynom's selling her house at Defendant Bunting's suggestion of an assignment that never materialized – resulting in hardship and expense – occurred completely off-base. Given this mixture of on- and off-base harm and the lack of any "hard and fast rule," *Brown*, 739 F.2d at 367, some harm occurring on military property does not automatically invoke *Feres*.

3. **Nature of Activity** – *Brown* requires the Court to "consider whether the activity out of which the action arose served some military purpose or mission." 739 F.2d at 368. *Brown*, which concerned the mock lynching of an African-American military member, ruled, "the activity in this case – a racially tinged mock hanging of a fellow soldier – served no conceivable or remote military purpose." 739 F.2d at 368; *accord Lutz*, 944 F.2d at 1486 (the Defendants' breaking and entering plaintiff's on-base office was not incident to service).

Similarly, here, many of Respondents' wrongdoings – sexual harassment, racial discrimination, retaliation, conspiracy to suppress civil rights, and arbitrary and capricious denial of full and recommended relief – also do not remotely serve any conceivable military purpose. The sexual parties and advances bring great dishonor on those individuals and dishonors the Air National Guard and our military as a whole, violating Articles 133 and 134 of the Uniform Code of Military Justice, yet the

Respondents were not charged or tried, and most likely never will be.

Given the above authorities rejecting a *per se* application of *Feres/Chappell*, this Court should grant this Petition.

II. LT. COL. LYNOM'S SUIT WILL NOT REQUIRE THE COURT TO SECOND-GUESS MILITARY DECISIONS OR IMPAIR ESSENTIAL MILITARY DISCIPLINE.

Interference with military affairs is a crucial factor in a court's deciding whether or not to review a case such as Lt. Col. Lynom's. A quick review of the facts establishes that granting this Petition and accepting the case for full review will not intrude on matters better left to the military.

Lt. Col. Lynom seeks relief for the discrimination, retaliation, and deprivations Respondents inflicted on her through their conspiracy. The military record is in fact rife with the Air Force's own findings supporting Lt. Col. Lynom's claims.

First, the Secretary of the Air Force's Inspector General's Report concluded "it is more probable than not that Major Lynom has been treated unfairly."

Second, Lt. Colonel Griffith's Report of Investigation (ROI) found Lt. Col. Lynom the victim of "unlawful discrimination and reprisal." Even this ROI's final version – which the Respondents and others named in it mutilated – finds that Respondents denied Lt. Col. Lynom "full and fair consideration." The report also stated some senior

ANG officials were "less than exemplary in their handling of matters with respect to Major Lynom's situation."

Third, Lt. Col. Cheryl Brown's Memorandum to Defendant Col. Byrd found the treatment of Lt. Col. Lynom reprehensible and improper on the part of "commissioned officers (and especially supervisors)" as well as violating regulations and ethical standards. Lt. Col. Brown, a member of a special panel Gen. Conaway appointed to review Lt. Col. Lynom's complaints, believed Lt. Col. Lynom had "been mishandled by the 'system,' " and expressed deep concern about the panel's legality and conduct, "[perceiving] that it was formed in order to circumvent the recommendations of the Inspector General's report of investigation."

Fourth, the second AFBCMR panel specifically noted that the allegations raised by Lt. Col. Lynom's counsel – regarding a history of harassment, discrimination, and reprisal damaging to her career and health – are "in some ways conceded" since they were neither contradicted nor "validly disputed." The Air Force made further findings in support of Lt. Col. Lynom in its November 2, 1999, Correction Board Decision. Given the Air Force findings that Respondents victimized Lt. Col. Lynom, this Court will not second-guess the military if it decides the same.

The issues presented here are of prime importance to that large segment of our citizenry who volunteer to serve their country by putting on the uniforms of our Armed Forces. They must not be allowed to be treated as

second-class citizens without the full protection of Constitutional rights.

CONCLUSION

The Supreme Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted this 4th day of April, 2001.

Lt. Col. Mary Lynom, *Petitioner*

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APPENDIX 1

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE

Pursuant to the provisions of Fed. R. App.Pro.41(a)

1/24/01

BY: /s/ Dorothy E. Barrack, Deputy Clerk

ATTACHED: ___ Amending Order
___ Opinion
___ Order on Costs

No. 99-5399 **September Term, 2000**

Mary Lynom, Major,

Appellant

v.

Sheila E. Widnall, et al.,

Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 95cv00233)

Before: EDWARDS, *Chief Judge*, ROGERS and GARLAND, *Circuit Judges*.

JUDGMENT

(Filed Oct. 25, 2000)

This appeal from a judgment of the district court was presented to the Court and briefed by counsel. The Court

has accorded the issues full consideration and has determined that they occasion no need for a published opinion. *See* D.C. Cir. Rule 37(b). It is

ORDERED and **ADJUDGED** that the judgment of the district court is affirmed substantially for the reasons stated in the district court's opinion of September 17, 1998. *See Feres v. United States*, 340 U.S. 135, 146 (1950); *see also United States v. Stanley*, 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace*, 462 U.S. 296, 300-05 (1983); *Bois v. Marsh*, 801 F.2d 462, 469-71 (D.C. Cir. 1986). At oral argument, counsel for plaintiff suggested that her complaint could avoid the bar erected by the *Feres* doctrine if it were limited to actions taken by certain defendants after their retirement from the military. Because, as counsel conceded, this argument was made for the first time at oral argument, it is forfeited. *See Chedick v. Nash*, 151 F.3d 1077, 1084 (D.C. Cir. 1998); *see also Swanks v. Washington Metro Area Transit Auth.*, 179 F.3d 929, 936 (D.C. Cir. 1999); *United States v. Thompson*, 27 F.3d 671, 677 n.1 (D.C. Cir. 1994).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk

APPENDIX 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5399 **September Term, 2000**
95cv00233

Mary Lynom, Major,

Appellant

v.

Sheila E. Widnall, et al.,

Appellees

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed Jan. 4, 2001)

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk